Supreme Court, U.S.
FILED
JUN 8 - 2009
OFFICE OF THE CLERK

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Nos. 08-803, 08-826

IN THE

Supreme Court of the United States

MATTHEW D. ALFIERI, ET AL.,
KENNETH PIETROWSKI, ET AL.,

Petitioners,

v.

SALLY L. CONKRIGHT, ET AL.,

Respondents.

On Petition For A Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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June 2009

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SUPPLEMENTAL BRIEF

Respondents in Nos. 08-803 and 08-826 file this supplemental brief in response to the brief filed by Plaintiffs-Appellees-Petitioners (Release Petitioners) regarding this Court's decision in *Kennedy* v. *Plan Administrator for DuPont Savings & Investment Plan*, 129 S. Ct. 865 (2009). As the Government correctly observes, and contrary to Release Petitioners' assertions, *Kennedy* "provides no basis for either plenary review or vacating the decision below and remanding for further proceedings" on the release issue. Br. U.S., at 21.

Kennedy presented the question whether, in determining how to distribute benefits, a plan administrator must give effect to a beneficiary's waiver of benefits that was not executed "in accordance with the [plan] documents." 129 S. Ct. at 875 (quoting 29 U.S.C. § 1104(1)(D)). Emphasizing the importance of minimizing burdens on plan administrators, the Court held that, under ERISA's plan documents rule, a plan administrator may ignore waivers that conflict with plan terms.

This narrow holding is entirely inapposite here, where the Plan is silent on the releases at issue and enforcement of the releases thus does not conflict with Plan terms. Moreover, unlike the waiver in *Kennedy*, the releases here were obtained *for the benefit* of the plan administrator, as they required Release Petitioners to relinquish *disputed* claims to benefits. Precluding their enforcement thus would *disserve* the ERISA goal of minimizing the burden on plan administrators. *See* Br. U.S., at 21

(distinguishing *Kennedy* from this case on the ground that, unlike the waiver in *Kennedy*, "the releases here purport to cover claims against the plan and its administrator, and the release petitioners' entitlement to benefits was in dispute when they signed the releases"). Accordingly, *Kennedy* provides no support for Release Petitioners' petitions, which should be denied.

Review of Release Petitioners' new statutory claim should also be denied because it was not "pressed or passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted), and thus, as the Government agrees, "is not properly before this Court," Br. U.S., at 21.

I. *KENNEDY* IS ENTIRELY INAPPOSITE TO THE RELEASES AT ISSUE HERE.

Release Petitioners' contention that the releases are invalid under *Kennedy* is incorrect. Nothing in the language of *Kennedy*, the statutory provisions it construes, or the policies that underlie it calls into question the Second Circuit's decision to enforce the releases signed by Release Petitioners.

1. In *Kennedy*, the Court first considered whether a former spouse's waiver, in the context of a divorce decree, of her right to survivor benefits under her ex-husband's pension plan violated ERISA's anti-alienation provision, 29 U.S.C. § 1056(d), and was therefore *per se* void under ERISA. *Kennedy*, 129 S. Ct. at 873. After holding that such a waiver is not an "inevitable nullity," the Court turned to the question whether the waiver is "effective where [it] is *inconsistent with plan documents*." *Id.* at 870

(emphasis added). The Court concluded that where the plan documents "provide that the plan administrator will pay benefits to a participant's designated beneficiary, with designations and changes to be made in a particular way," the plan need not honor designations or changes that are not made in the required manner. *Id.* at 877.

In reaching this conclusion, the Court relied on a provision of ERISA requiring plan administrators to act "in accordance with the [plan] documents." 29 U.S.C. § 1104(a)(1)(D). The Court explained that this plan documents provision serves "the congressional goal of minimizing the administrative and financial burdens on plan administrators" by enabling plan administrators "to look at the plan documents and records conforming to them to get clear distribution instructions, without going into court." *Kennedy*, 129 S. Ct. at 876 (internal quotation marks omitted). By reducing the burdens on plan administrators, the Court observed, the plan documents rule promotes "simple administration, . . . and ensur[es] that beneficiaries get what's coming quickly." *Id.* at 875-76 (internal quotation marks omitted and brackets altered).

Applying the plan documents rule to the facts presented, *Kennedy* upheld the plan administrator's decision to distribute the benefits to the participant's ex-wife because she remained the participant's designated beneficiary and because the plan-prescribed method for disclaiming her interest had not been not followed. *See id.* at 877.

Contrary to Release Petitioners' sweeping assertion, *Kennedy* does not "prohibit[] the federal courts from giving effect to" a release "whenever such a [release] is interposed as a barrier to the payment of benefits according to the terms of ERISA plan documents." Pets. Supp. Br. (Nos. 08-803 & 08-826), at 9. *Kennedy* held only that plan administrators are not required to give effect to waivers that are "inconsistent" with plan terms; it reserved the questions whether a waiver may be enforced "in circumstances in which [the waiver] is consistent with plan documents," 129 S. Ct. at 875 & n.10, or in which the plan simply does not address waiver at all, *see id.* at 877 n.13.

Here, no provision of the Xerox Plan prohibits participants from executing a release of a disputed claim for benefits. While Release Petitioners suggest that they were "entitled by law" to benefits calculated without reference to the phantom account offset methodology (Pets. Supp. Br., at 6-7), their claims were disputed and being actively litigated at the time they gave their releases. *See* Resp. Consol. Br. Opp. (Nos. 08-803 & 08-826), at 4-6; Br. U.S., at 21 (observing that, unlike the waiver in *Kennedy*, "the release petitioners' entitlement to benefits was in dispute when they signed the releases"). Because Release Petitioners' claims to benefits were in dispute, nothing in ERISA or the plan terms precluded them from releasing those claims. *E.g.*, *Stobnicki* v. *Textron, Inc.*, 868 F.2d 1460, 1465 (5th Cir. 1989) ("[A] controversy between good-faith adverse claimants to pension plan benefits is subject to settlement like any other.").

Nor does the Plan impose a particular procedure or format for securing a release that was not followed here.[1] Accordingly, *Kennedy* does not address the releases signed by Release Petitioners, much less preclude their enforcement.

2. The main rationale this Court cited for applying the plan document rule in *Kennedy*, moreover, was to minimize the burden on plan administrators faced with conflicting instructions on how to distribute benefits. By allowing plan administrators to ignore extra-plan documents that conflict with plan terms, the Court sought to prevent plan administrators from "be[ing] drawn into litigation" and subject to "double liability" for their benefits determinations. *Kennedy*, 129 S. Ct. at 875-76.

Here, permitting enforcement of the releases that Release Petitioners gave in exchange for severance

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[1] The release itself expressly advised Release Petitioners to consult with an attorney before signing a release, recommended that they take sufficient time in deciding whether to sign a release, gave them 45 days to consider the release before returning it to Xerox, and gave them another seven days to revoke the release after signing it. *See* Resp. Consol. Br. Opp., at 5. Moreover, Plaintiffs' counsel was aware of the releases and understood that their execution would bar his clients' claims: counsel asked the District Court (unsuccessfully) to issue an order barring Defendants from seeking a release of their claims in this case. *See id.* at 5-6.

payments does not encourage litigation against the Plan, much less subject it to double liability. To the contrary, permitting enforcement of releases obtained for the benefit of ERISA plans would discourage litigation and reduce burdens on plan administrators. That the goals the plan documents rule are designed to serve are *advanced* by enforcing the releases illustrates that Release Petitioners' reading of *Kennedy* stretches its holding far beyond the circumstances to which it applies.[2]

3. The implications of Release Petitioners' expansive reading of *Kennedy* are far-reaching. It is well established that releases of disputed claims for ERISA benefits are effective so long as they are knowing and voluntary under the totality of the

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[2] *Kennedy* is also inapposite because the waiver at issue there is fundamentally different from the releases executed here. The designated beneficiary in *Kennedy* purported to relinquish her interest in her ex-husband's pension benefits. That decision thus directly implicated the plan administrator's duty to distribute the benefits as prescribed by the plan. Here, by contrast, the Release Petitioners merely released their right to dispute the way that the Plan Administrator had determined their benefits in the first instance. Thus, while the waiver in *Kennedy* purported to tell the plan administrator how to distribute benefits in the first instance, the releases here merely foreclose a *challenge* to the way the Plan Administrator distributed benefits in the first instance.

circumstances. *See, e.g.*, *Smart* v. *Gillette Co. Long-Term Disability Plan*, 70 F.3d 173, 181-182 (1st Cir. 1995); *Finz* v. *Schlesinger*, 957 F.2d 78 (2d Cir. 1992); *Leavitt* v. *Northwestern Bell Tel. Co.*, 921 F.2d 160, 162 (8th Cir. 1990). Release Petitioners nevertheless argue that this Court in *Kennedy* overruled this settled precedent without any acknowledgment that it was doing so. In fact, as explained above, *Kennedy* has no bearing on whether an ERISA plan participant may – in exchange for valuable consideration – release a disputed claim for pension benefits. The standard for a valid release has been and remains whether the release was knowingly and voluntarily given, and the Second Circuit properly determined that the releases at issue here were knowing and voluntary on the "undisputed facts" of this case. *See* Resp. Consol. Br. Opp., at 9-10, 15-18.

II. RELEASE PETITIONERS DID NOT RELY ON ERISA'S PLAN DOCUMENTS PROVISION BELOW.

As the Government correctly observes, Release Petitioners' eleventh-hour plan documents claim "is not properly before this Court." *See* Br. U.S., at 21. Release Petitioners did not raise this statutory question in their petitions, and the question is not fairly included within the questions they presented to the Court. Release Petitioners, moreover, have waived their statutory claim because they failed to present it to the courts below – indeed, they presented a *contradictory* claim below. Accordingly, it would be inappropriate for the Court to consider this new statutory question. It would also be

imprudent, because the Court would not have the benefit of the lower courts' treatment of the issue.

1. Supreme Court Rule 14 provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." A question that is merely "complementary" or "related" to the question presented in the petition is not "fairly included therein." *Yee* v. *City of Escondido*, 503 U.S. 519, 537 (1992) (holding that question whether an ordinance affected a regulatory taking was not fairly included within question whether it affected a physical taking) (internal quotation marks omitted). The Court will "consider questions outside those presented in the petition for certiorari . . . only in the most exceptional cases." *Id.* at 535 (citations and internal quotation marks omitted).

Here, the petitions do not assert that the releases are invalid or unenforceable on the ground that they violate any provision of ERISA. Rather, the petitions argue that the Second Circuit incorrectly concluded, as a matter of federal common law, that the releases were knowing and voluntary. The question whether the releases are invalid under ERISA's plan documents provision is "quite distinct, both analytically and factually," from whether the releases were knowingly and voluntarily given. *See Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 32 (1993) (declining to entertain "analytically and factually" distinct question). Because Release Petitioners' new statutory claim is not fairly included within their questions presented, review by the Court is inappropriate.

2. Release Petitioners failed to raise the statutory claim not only in their petitions, but also in the courts below. Indeed, by arguing to the courts below that the releases were invalid because they were not knowingly and voluntarily given, Release Petitioners' argument below was *inconsistent* with their new (and novel) assertion that the knowing and voluntary standard does not apply.

As this Court has repeatedly recognized, prudence "dictates awaiting a case in which [an] issue was fully litigated below, so that [the Court] will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee*, 503 U.S. at 538 (citing *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 552, n.3 (1990)). For that reason, the Court routinely declines to consider claims that were not preserved in the proceedings below. *See, e.g.*, *Auer* v. *Robbins*, 519 U.S. 452, 464 (1997); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Lawn* v. *United States*, 355 U.S. 339, 362 n.168 (1958) ("Only in exceptional cases will this Court review a question not raised in the court below."). Release Petitioners do not identify any principled basis for the Court to deviate from this regular practice – or the Court's practice of allowing issues to percolate in the lower courts before granting certiorari – in this case.

3. While Release Petitioners do not dispute their failure to preserve their new statutory claim, they make the remarkable assertion that the Second

Circuit "passed upon" the issue. Pets. Supp. Br., at 8 n.4. Contrary to their assertion, the Second Circuit did not "pass[] upon" the statutory issue that they now seek to raise.

According to Release Petitioners (*id.*), the Second Circuit passed upon the statutory issue because it (implicitly) determined that the federal common law standard properly applied to this case. The Second Circuit's failure to consider an entirely distinct statutory claim, not presented by the parties, however, plainly is not tantamount to a rejection of that claim. Under any fair reading of the Second Circuit's decision, it is clear that the Second Circuit did not pass upon the question whether ERISA's plan documents provision renders the release of disputed claims for pension benefits invalid. Accordingly, it would be inappropriate and imprudent for the Court to grant Release Petitioners' petitions.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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